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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/470,571	06/06/1995	JOHN C. HARVEY	5634.261	7586

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EXAMINER

HARVEY, DAVID E

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2614

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41

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.
08/470,571

Applicant(s)
Harvey et al.

Examiner
David E. Harvey

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— The MAILING DATE of this communication appears on the cover sheet with the correspondence address —

THE REPLY FILED Jan 28, 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid the abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

THE PERIOD FOR REPLY [check only a) or b)]

- a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.
- b) ☐ In view of the early submission of the proposed reply (within two months as set forth in MPEP § 706.07 (f)), the period for reply expires on the mailing date of this Advisory Action, OR continues to run from the mailing date of the final rejection, whichever is later. In no event, however, will the statutory period for the reply expire later than SIX MONTHS from the mailing date of the final rejection.

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will be entered upon the timely submission of a Notice of Appeal and Appeal Brief with requisite fees.
3. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search. (See NOTE below);
- (b) ☐ they raise the issue of new matter. (See NOTE below);
- (c) ☒ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without cancelling a corresponding number of finally rejected claims.

NOTE: see paragraph 1 of the attachment

4. ☐ Applicant's reply has overcome the following rejection(s):

5. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in separate, timely filed amendment cancelling the non-allowable claim(s).
6. ☐ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because:

7. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
8. ☐ For purposes of Appeal, the status of the claim(s) is as follows (see attached written explanation, if any):
Claim(s) allowed: _____
Claim(s) objected to: _____
Claim(s) rejected: _____
9. ☐ The proposed drawing correction filed on _____ a) ☐ has b) ☐ has not been approved by the Examiner.
10. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____
11. ☒ Other: Note "interview summary" in paragraph 2 of the attachment.

ANDREW FAILE

SUPERVISORY PATENT EXAMINER

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1. The examiner notes that the amendments filed 1/28/02 extensively amends the pending claims by both adding and deleting limitations from the claims [e.g. in line 2 of claim 56 a "remotely originated and locally supplied" limitation has been added and an "interactive" limitation has been deleted]. These extensive amendments raise new issues that would require further search and/or consideration.

2. A personal interview was held between applicant and the PTO on 9/26/01. Attending this meeting were: Mr. John C. Harvey, Mr. Joseph M. Guiliano, Mr. Jay Lecher, Mr. Andrew Faile, and David Harvey. The following has been provided in and attempt to best summarize/characterize/clarify the issues and positions that were discussed and taken by the respective parties:

Part I: During the interview of 9/26/01, applicant took the position that "the claim" itself is the invention. Being such, it was applicant's belief that the same invention is always being claimed by a given "same" claim; i.e. regardless of the disclosure from which said same claim derives its required section 112 support. Applying this belief to the issue of priority, it was applicant's position that he is entitled to the 1981 priority date of his 1981 parent application for each of the pending claims simply by showing that each of the pending claims might be given a different 1981 and 1987 claim interpretation which allowed them to be separately/independently read back onto teachings from the respective 1987 and 1981 disclosures. To applicant, the fact that each claim had to be given different 1981 and 1987 interpretations to be read back onto the 1981 and 1987 disclosures was irrelevant to the issue of priority. The examiner continues to disagree.

The examiner agrees that "the claim" defines the invention. However, unlike applicant, the examiner believes that meaning and scope of a claim's

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limitations are determined by the disclosure from which the claim's section 112 support is derived. Namely, "the claim" defines the invention while the disclosure defines the meaning and scope of the claim. Therefore, if identically worded claims are drafted within significantly different disclosures, then it is the examiner's belief that the scope/meaning/"broadest reasonable interpretation" of these identically worded claims will (most likely) differ too. And if the scopes/meanings/"broadest reasonable interpretations" of the respective claims do in fact differ, e.g. if the respective interpretations provided by the respective disclosures fail to perfectly circumscribe the same subject matter, then "*common subject matter*" is not being claimed with respect to the two different disclosure even though the claims' wording is identical.

Because each of applicant's currently pending amended claims derives at least part of its section 112 support from teachings and subject matter that is found only in applicant's current 1987 disclosure, each of the currently pending claims is (at best) only entitled to the 1987 original filing date of the current disclosure. Specifically, the mere fact that the scope and meaning¹ of each claim as defined by the current 1987 disclosure necessarily differs from the scope and meaning of each claim as defined by the 1981 disclosure, is enough to deny applicant his claim to the earlier 1981 filing date; e.g. because it shows that the current 1987 scope and meaning of each claim does not constitute/encompass "*common subject matter*" with respect to the 1981 scope and meaning that might have been afforded it had section 112 support been properly derived from the earlier filed 1981 parent.

In summary:

- 1) It seems to be applicant's position that two identically worded claims are necessarily claiming the "same invention"/"common subject matter", i.e. even when the two claims derive section 112 support from vastly different disclosures, simply by the fact that the respective claims are identically worded; whereas

¹ The wording of the respective descriptions may be different provided that they describe the same subject matter.

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2) It is the examiner's position that such identically worded claims are only claiming the "same invention"/"common subject matter" if the section 112 support provided by the respective disclosures is the same and/or exactly equivalent.

Part II: During the interview held on 9/26/01, applicant indicated that the examiner should always give a claim its broadest reasonable interpretation during the examination process. The examiner agrees. If the broadest reasonable interpretation were/could always applied to a claim's recitations in a vacuum, then the broadest reasonable interpretation of a given claim would always be the same regardless of the disclosure that supports it under section 112. However, claims are not read in a vacuum. Specifically, one must use the instant disclosure to determine the metes and bound of the claim's limitations. In the present prosecution, the "instant application" from which the "broadest reasonable interpretation" must be derived for all pending claims is the 1987 disclosure alone (i.e. because the 1981 disclosure was left behind and was not carried forward into the 1987 disclosure). The following is noted:

A) Much of the terminology that is now recited in the pending claims has been explicitly defined within the written description of the instant 1987 disclosure: e.g. the term "programming" being but one example. Because the instant 1987 disclosure provided the "intrinsic" dictionary by which such recited claim terminology should be defined, the limitations of the claims necessarily gets these explicitly defined definitions.

B) The examiner notes that applicant's originally filed 1981 disclosure also explicitly defined much of this same claim terminology; e.g. again, the term "programming" being but one example. However, the definitions given to the recited terminology by the 1981 often differs from the definitions given to this same terminology via the 1987 disclosure. Being such, when the 1981 disclosure is used as an "intrinsic" dictionary by which the recited

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terminology of a claim is defined, the resulting claim interpretation is quite different from that which is obtained via the instant 1987 disclosure. For this reason alone, any claim which contains such differently defined terminology is not entitled to the 1981 effective filing date of the 1981 disclosure.

C) During the interview, applicant admitted that the “programming” terminology was broader when defined via the instant 1987 disclosure than it was when defined via the 1981 disclosure. Being such, applicant pointed out that the 1987 interpretation of the “programming” terminology encompasses the 1981 interpretation of this same terminology and is thus entitled to priority. The examiner disagrees. The mere fact that the 1987 definition is broader and encompasses more than the 1981 definition by itself refutes applicant’s claim to the 1981 priority date for such recitation. Specifically, the only subject matter which is “common” to both the 1981 and 1987 disclosures in this case, i.e. with respect to the respective 1981 and 1987 “programming” definitions, is that portion of the 1981 definition which has been encompassed by the broader 1987 definition. That is, the “common subject matter” that exists between the 1987 and the 1981 definitions of “programming” is the 1981 definition itself. By alleging the 1981 priority date of the recited “programming” terminology, applicant must be suggesting one of the following:

- 1) That the currently recited “programming” terminology should be held to its “common” meaning/definition, meaning that the “programming” terminology should be given a definition corresponding to that portion of the 1981 definition which was circumscribed by the instant 1987 definition.

[NOTE: Such an interpretation would be improper because the 1987 disclosure is the instant disclosure from which all section 112 issues must be determined (i.e. the 1981 disclosure is not part of the instant disclosure and thus cannot be properly relied

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on as the “intrinsic” dictionary by which a claims terminology is defined]; or

2) That the currently recited “programming” terminology should be held to its broader 1987 meaning/definition and yet be given the 1981 effective filing date of its earlier and more narrow 1981 definition/meaning

[NOTE: Such an interpretation would also be improper because it transports the broader 1987 definition of programming back in time to the 1981 filing date of a vastly more limited 1981 “programming” definition (i.e. a 1981 definition which was, one again, left behind in the drafting of the 1987 disclosure)].

For the record, it is the examiner’s position that this kind of recited terminology, e.g. terminology which has been defined differently within the 1981 disclosure and the instant 1987 disclosure, gets its 1987 definition and the 1987 filing date to boot.

PART III: The examiner maintains that the situation cited in “PART II” of this communication illustrates one reason why the same claim can be read on different disclosures within continuing applications and yet the claims of the child still not be entitled to the priority date of the earlier filed parent application; e.g. a situation in which the terminology of the same claim takes on vastly different meanings/scopes when read in light of the intrinsic evidence that is provided by the different disclosures. Thus, the examiner strongly disagrees with applicant suggestion that a given claim is necessarily entitled to the filing date of a parent application simply by showing that the claim can read on the different disclosures of the continuing applications; e.g. for priority to be established, it must also shown that what is circumscribed by the pending claim(s) is “common subject matter” [note “PART I” of this communication].

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PART IV: In trying to address the issues cited above, during an interview held on 9/26/01, applicant set forth the following example:

1) Applicant's Example:

- a) a parent application A discloses a bridge for traversing water;
- b) a child application B discloses a boat for traversing water;
- c) Application B includes a statement stating that it is a continuation of application A, however, application B fails to incorporate the disclosure of application A (either physically or by reference).

Given the fact pattern set forth above, applicant contended that one or more claims could be introduced into application B which would be entitled to the filing date of application A. Specifically, applicant contended that application A and application B contained "common subject matter" in that they both described structures, albeit different structures, for traversing water. Therefore, applicant took the position that a claim which broadly recited an "apparatus for traversing water" could be introduced into application B which was also entitled to the earlier filing date of application A. The examiner disagrees. Specifically, the examiner maintains that the broadest reasonable interpretation for "an apparatus for traversing water" is defined by "boat" when introduced into application B. The examiner maintains that the broadest reasonable interpretation for "an apparatus for traversing water" is defined by "bridge" when introduced into application A. These respective "broadest reasonable interpretations" do not circumscribe the same subject matter and therefor do not constitute the required "common subject matter." Therefor the "an apparatus for traversing water" of the B application would not be entitled to the filing date of the A application.

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PART V: In the example cited by applicant:

- 1) The two A and B disclosures have been presented as having described different solutions to a common problem wherein the common problem being solved was explicitly identified by applicant [namely, the boat and bridge solved the problem of traversing water];
- 2) The proposed claim was “generic” in the sense that it was presented so as to be directed to the “common problem” which was being solved and therefor the meaning of the proposed claim read in an analogous manner on both the A and B disclosures (i.e. “corresponding subject matter” was clearly being claimed); and
- 3) The limitations of the proposed “generic” claims was “immediately discernible” within both of the A and B disclosures.

This is not true of the claims which have been introduced in the 1987 (“B”) applications of the present prosecution. Specifically, the examiner maintains that the example cited by applicant does not accurately portray the present situation. Therefor, the examiner now sets forth his own example which he believes to be a more accurate representation of the state of the present prosecution.

1) The examiner’s example:

- a) a parent application A discloses a steam engine as comprising a vehicle which transverses water by riding over the water via a train trestle;
- b) a child application B discloses a boat as comprising a vehicle which transverses over water via the water;
- c) Application B includes a statement stating that it is a continuation of application A, however, application B fails to incorporate the disclosure of application A (either physically or by reference).

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An applicant introduces a claim into application B reciting:

“A vehicle for traversing water comprising:

- 1) a wheel for guiding the vehicle; and
- 2) a component that propels the vehicle over the water by modifying a state of water.”

The applicant notes that the introduced claim is supported by the disclosure of application B because the disclosed “boat” comprises a steering wheel for guiding the vehicle and a propeller for propelling the vehicle by modifying a state of water. The applicant then alleges that he is entitled to the earlier filing date of the A application because the same claim finds support in the A application too. Specifically, the applicant notes that the steam engine also comprises a wheel which run along the tracks of the trestle thereby guiding the engine over the water, and the steam engine comprises a boiler for modifying a state of water, e.g. turning it to steam, in order to propel the steam engine over the water.

While it is true that the introduced claim may be distorted from its actual scope/meaning (e.g. as properly defined by the B disclosure) so as to read in a different way on different subject matter contained in the A disclosure, the subject matter that is being cited for support of the claim in the two disclosures is very different and does not comprise “common subject matter” that is required to support priority to the earlier filing date. For the same reason, the claims which are based on applicant’s 1987 disclosure, e.g. claims whose recitations rest on the “SPAM” technology that exists only within the 1987 disclosure (i.e. as alleged by applicant’s own submission), are not entitled to the 1981 filing of the 1981 disclosure; i.e. even if applicant can distort the meaning of each of the introduced claims (e.g. as properly defined by the instant 1987 disclosure) to read on **different** subject matter from the 1981 disclosure.

Specifically, unlike “applicant’s example” cited above, the claims which have been introduced into the B applications of the present prosecution are not even “generic” in the sense that they can be “**simultaneously read**”

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on both of the A and B disclosures. For example, Applicant has never identified the alleged “common invention” that can be found in both of the 1981 and the 1987 disclosures to which each of the pending claims is directed; e.g. in the same way that applicant identified it with respect to “applicant’s example” above. To the contrary, it is the examiner’s belief that such a “common invention” cannot be identified in the context of **all** limitations of the introduced claims because such a common invention/disclosure does not exist (e.g. the 1981 disclosure and inventions were not carried forward). Applicant can certainly point in the direction of the “WALL STREET WEEK” application being representative of an alleged “common theme”, however the recitations of all of the introduced claims go far beyond the broad “WALL STREET WEEK” concept. At best, when one reads the alleged support for each claim that has been submitted by applicant, one finds that different meanings/interpretations must be applied to the limitations of each introduced claim so as to allow them to be “**sequentially read**”, with different meaning, on different subject matter from the different 1981 and 1987 disclosures, respectively; e.g. as in the “examiner’s example” cited above. Thus, that which is being claimed from the two disclosures does not represent “common subject matter” and, being such, the claims that are introduced into application having the instant 1987 disclosure are not entitled to the 1981 priority date of the 1981 parent application.

PART VI: The examiner notes that the basic requirements of section 120 include “continuity of disclosure”. Specifically, for priority to an earlier filing date to be established, section 120 requires that the invention now sought to be patented in a child application to have been “disclosed in the manner provided by the first paragraph of section 112” within the disclosure of the parent application. Significantly, section 120 does not indicate that only the descriptive requirement of section 112-1 must be met, but instead it indicates that all of the requirements of section 112-1 must be met [e.g. this

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includes the “enablement” requirement and the “best mode” requirement too].

TRANSCO [38 F.3d 551; 32 U.S.P.Q.2D (BNA) 1077] was cited in the last Office action. The TRANSCO decision determined that one is not required to update his “best mode” when filing a continuation. Thus, it is true that the current applicant was not required to update his “best mode”. However, applicant chose to update it. Unfortunately, in *dicta*, Judge Rich warned that requiring an applicant to update the best mode when filing the continuation application defeats the purpose of the “continuation”:

“It must be understood that the introduction of a new best mode disclosure would constitute the injection of ‘new matter’ into the application and automatically deprive the applicant of the benefit of the earlier filing date of the parent or original application for any claim whose validity rests on the new best mode disclosure”.

During the present prosecution, the examiner has simply adopted the position of Judge Rich as set forth in this decision. The examiner acknowledges that TRANSCO has been cited by the examiner for the clarity in which its *dicta* explains the current examiner’s understanding of the present issues, and not for “authority” given by the decision.

PART VII: During the interview, applicant stated his belief that TRANSCO [38 F.3d 551; 32 U.S.P.Q.2D (BNA) 1077] actually supports his position. The examiner does not understand why applicant has this belief. Clearly, TRANSCO indicates that one does not have to update the “best mode” when filing a continuation. However, in the present prosecution, applicant decided to update his “best mode” anyway; e.g. via the introduction of “SPAM” transmission technology and new circuit configurations (i.e. issues which were addressed in detail via the last Office action). The *dicta* in the TRANSCO decision clearly warns against the path chosen by present applicant if priority to the earlier filing date is desired.

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PART VIII: During the interview, applicant indicated that leaving the 1981 disclosure behind when drafting and filing of the 1987 disclosure was a good thing. Applicant noted that one could just imagine the difficulty which would now exist in the present 1987 disclosure had the 1981 disclosure actually been incorporated; i.e. given that the same terminology was defined differently by respective disclosures. Applicant's position is telling. By acknowledging that conflicts would have been created had the 1981 disclosure been incorporated into the 1987 disclosure applicant, in effect, seems to be admitting that the 1981 disclosure was not incorporated into the 1987 disclosure; e.g. an apparent departure from positions that applicant has taken in the last response and in testimony given before the ITC. Specifically, had the 1981 disclosure actually been incorporated into the 1987 disclosure, as applicant has previously alleged, then the conflicts which now exist between the respective 1981 and 1987 disclosures would have necessarily found their way into the instant 1987 disclosure itself. The simple fact that the conflicts did not find their way into the present application seems to be a good indication that the 1981 disclosure was not carried forward as is required for a claim of "priority" to be granted.

PART IX: In both of the "examples" cited above, the respective A and B disclosures clearly set forth different "best modes" in terms of the "apparatus for traversing water". Namely, "steam engine" or "bridge" represented the best mode in applications A, whereas "boat" represented the best mode in applications B; i.e. assuming that the disclosed modes are in fact the "best mode" that was known to applicant at the time of filing. Likewise, it appears that "SPAM" represents the "best mode" that was described within applicant's instant 1987 disclosure whereas something other than "SPAM" represents the "best mode" that was described in applicant's 1981 disclosure; i.e. again, assuming that the best mode was described in both applications. It is this lack of continuity of the "best mode" between applications, e.g. the fact that the disclosed "best mode" has changed from the 1981 disclosure to the 1987 disclosure, that denies applicant his claim to the 1981 filing date for

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any introduced claim whose validity rests on the new "best mode" of the 1987 disclosure (e.g. "SPAM"). Because the validity of all of the currently pending claims necessarily rests on "SPAM", e.g. being that "SPAM" was introduced via the 1987 disclosure and comprises all of the control/instruct signals that are transmitted by the 1987 alleged inventions, all of the currently pending claims only get the 1987 filing date (at best).

During the interview of 9/26/01, applicant expressed concern that the examiner was raising the issue of "best mode" in the form of a "best mode" rejection. The examiner is not. To the contrary, the examiner has assumed that applicant has fulfilled the "best mode" requirement in both his 1981 and the 1987 disclosures. However, because the "best mode" has clearly changed between disclosures, i.e. a fact which is self-evident by the introduction of "SPAM" in the 1987 disclosure, applicant's claim to priority of the 1981 filing date is being refuted. Again, the scope/meaning of any introduced claim is necessarily determined by the "best mode" of the instant 1987 disclosure (e.g. by the disclosure of "SPAM") and being such, the 1987 scope/meaning of each claim is not entitled to the 1981 priority date of a disclosure in which the new best mode (e.g. "SPAM") was not described; i.e. the 1981 scope/meaning for each claim is different due to the absence of the "SPAM" disclosure.

In summary, to the extent of the examiner's understanding, the 1987 disclosure and the 1981 disclosure represent different "best modes": e.g. the "on"/"off" trigger/cuing signals of the 1981 disclosure were replaced by "SPAM", the circuit configurations of the 1981 disclosure were replaced by 1987 circuit configurations, new modes for processing "SPAM" were incorporated into all the added 1987 illustrated structures, etc... Because a "new best mode" has been introduced via the 1987 disclosure, in the words of Judge Rich, applicant has "automatically deprived" himself of the 1981 filing date.

[It must be noted that there are many other reasons why applicant has lost this 1981 effective filing date too (i.e. reasons which have been addressed above and in the last Office action)]

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PART X: As was addressed in the previous Office action, the 1987 disclosure literally replaced the 1981 disclosure. Therefor the 1987 disclosure alone constitutes the “instant disclosure” on which all section 112 issues must be considered for the currently pending claims. Because the “instant” 1987 disclosure introduced new system configurations and new signal transmission technology, and because the old system configurations and the old transmission system technology of the 1981 disclosure were not carried forward into the 1987 disclosure, it would appear that the “instant” disclosure has to represent a “new best mode disclosure” with respect to the earlier filed 1981 disclosure. However, the examiner does not dismiss the possibility that the 1987 disclosure actually described completely different inventions with respect the those of the earlier filed 1981 disclosure; i.e. wherein the respective inventions “correspond” to each other only with respect to the overall operations that they produce. In either case, the inventions described in the subsequently filed 1987 disclosure represent “new matter” with respect to the inventions previously described in the 1981 disclosure and therefor “automatically deprives” applicant of the earlier filing date for any claim whose validity depends on this new matter. That is, all of the pending claims are not entitled to priority in view that they all must rely on the instant 1987, and its newly introduced inventions, for their validity.

Again, the subject matter now sought to be patented within the pending child applications must be those which were introduced via the instant 1987 disclosure. These currently claimed 1987 inventions were not described in applicant’s 1981 disclosure accordance with all of the requirements of the first paragraph of section 112 as required under section 120 and thus are not entitled to the 1981 filing date [note “PART VI” above].

PART XI: The examiner noted that “Appendix A-C”, as provided in applicant’s most recent responses, were most helpful. Applicant stated that

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they would continue to submit such showings with their responses. The examiner also indicated that it would be helpful if applicant would provide a short "narrative" identifying the alleged "common subject matter", that can be found in both the 1981 and 1987 disclosures, that is being recited by each of the claims. Applicant indicated a willingness to provide such a showing too (i.e. in addition to the claim charts).

Any inquiry concerning this communication should be directed to **David E. Harvey** whose telephone number is **(703) 305-4365**. The examiner can normally be reached Monday-Friday between the hours of 9:30 AM and 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Andrew Faile, can be reached at (703) 305-4380.

Any response to this action should be mailed to:

Commissioner of Patents and Trademarks
Washington, D.C. 20231

or faxed to:

(703) 872-9314

Hand-delivered responses should be brought to Crystal Park II, 2121 Crystal Drive, Arlington, VA. Sixth Floor (Receptionist).

Any inquiry of general nature or relating to the status of this application or proceeding should be directed to the Technology Center 2600 Customer Service Office whose number is (703) 306-0377.

DEH 10/4/01


DAVID E. HARVEY
PRIMARY EXAMINER